Supreme Court, U.S.
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NO. 90-1969

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1990

REGINA THOMAS WALTON,

Petitioner,

v.

COWIN EQUIPMENT COMPANY, INC.,

Respondent.

REPLY BRIEF

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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ARGUMENT IN REPLY

UNDER THE SEVENTH AMENDMENT, TITLE VII ACTIONS IN WHICH BACK PAY IS RECOVERABLE ARE IN THE NATURE OF SUITS AT COMMON LAW, AND THUS ARE TRIABLE BY JURY.

I. The case at bar is an appropriate one for resolving the conflict among the circuits as to whether backpay is a legal remedy.

a) Despite Cowin Equipment Company's argument to the contrary members of this Court previously have noted the existence of a conflict and its importance, although in the context of 42 U.S.C. section 1981.

If backpay under Title VII is a legal remedy, the primary criterion is fulfilled for finding that the Seventh Amendment grants the right to a jury trial.[1] There is a conflict among the circuits on this question of whether backpay is a legal remedy,[2] even though the conflict

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[1]This Court described the criteria as follows: "First we compare the statutory action to 18th-Century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature. The second inquiry is more important in our analysis." *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 110 S.Ct. 1339, 1345 (1990) (citations and internal quotation marks omitted).

[2]*Cf., Setser v. Novack Investment Co.*, 638 F.2d 1137 (8th Cir. 1981), with *Moore v. Sun Oil Co. of Pennsylvania*, 636 F.2d 154 (6th Cir. 1980). The Sixth Circuit may have modified its position by implication of *Burke v. United States*, 929 F.2d 1119 (6th Cir. 1991), holding backpay to be "damages for personal injury" for purposes of the Internal Revenue Code.

arose in the context of 42 U.S.C. section 1981, rather than Title VII. Seizing upon this irrelevant contextual distinction, respondent glosses over or denies the conflict among the circuits in a footnote (Brief in Opposition, p.14, n.11).

But the conflict is of major importance, as noted by Justice White dissenting from a denial of certiorari on the issue. *Novack Investment Co. v. Setser,* 454 U.S. 1064, 102 S.Ct. 615, 70 L.Ed.2d 601 (1981). Justice White was joined in the dissent by two other justices. The three justices argued that it was the Court's obligation to resolve the conflict among the circuits because of the fundamental nature of the right to a jury trial. "It is not a tolerable rule of law that one's right to a jury trial depends upon the geographical location of the federal district court within which one files a complaint." *Id.*

In the same case Justice Stevens carefully explained his vote to deny the petition for writ of certiorari. His reason for voting to deny the petition in *Setser* does not apply to the case at bar. Justice Stevens noted that both courts involved in the putative conflict (the Sixth and Eighth Circuits), ultimately held the issue of liability should be decided by a jury, and that "the backpay issue arose in a somewhat unusual context." *Id.* In the case at bar the Court of Appeals for the Eleventh Circuit has blatantly ruled that the issues must be decided by a court, thus creating the full-fledged conflict which was lacking when Justice Stevens wrote his opinion respecting denial of the petition.

Furthermore, at least one other district court (besides the Northern District of Alabama court herein) is in the position of accepting summary guidance from its Circuit Court of Appeals without the benefit of the reasoning by which the Court of Appeals reached the conclusion that

Title VII cases are non-jury. Attached hereto as an Appendix is the August 12, 1991, opinion in *Linares v. City of White Plains,* S.D. N.Y. (1991 WL 155521), in which Chief Judge Brieant granted a motion to strike a jury demand based upon an unpublished Second Circuit decision, even though his own analysis was that Title VII cases are triable by jury.

b) As far as backpay is concerned, the case at bar is identical to cases arising under 42 U.S.C. section 1981; therefore, the Court has no appropriate basis for declining to resolve the conflict among the circuits regarding jury trials for backpay.

Respondent suggests, "... the equitable remedial scheme under Title VII is totally different from the remedial scheme under Section 1981 under which compensatory and punitive damages can be obtained." (Brief in Opposition, p.14, n.11). The quoted language from Respondent's Brief contains a crucial overstatement. The two schemes are not *totally* different. They are identical as far as backpay is concerned, and it is the issue of backpay which is isolated in the conflict among the circuits.

Where an individual employee claims lost wages caused by an intentional violation of Title VII, as in the case at bar, the award of backpay (subject to defenses such as failure to mitigate) is necessary under the case law.

Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), established the solid presumption in favor of retroactive relief. Defendant therein argued that the lower court was justified in denying backpay because its breach of Title VII was not in bad faith. The Court disagreed, holding, "... backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of

eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.*, 422 U.S. at 421, 95 S.Ct. at 2373.

The *Albemarle Paper Co.* presumption has retained its force without qualification. *See, e.g., City of Los Angeles, Department of Water and Power v. Manhart,* 435 U.S. 702, 723, 98 S.Ct. 1370, 1383, 55 L.Ed.2d 657 (1978); *Sellers v. Delgado Community College,* 839 F.2d 1132, 1136 (5th Cir. 1988) ("... the instances wherein such an award is not granted are exceedingly rare.").

Thus, there are isolated special situations in which the retroactive relief of backpay may be denied. An employer may plead such special circumstances and seek a ruling that backpay is not appropriate. But in the case at bar, a denial of backpay would have been an abuse of discretion as a matter of law. This is the appropriate case for reaching and resolving the question of jury trials for backpay.

II. The Eleventh Circuit itself joins the Courts of Appeal in recognizing, as they must, that backpay is not restitution.

Subsequent to its decision in the case at bar, the Eleventh Circuit decided *Hill v. Winn-Dixie Stores, Inc.,* 934 F.2d 1518 (11th Cir. July 10, 1991). Plaintiff Hill had brought suit pursuant to the Jury System Improvements Act, 28 U.S.C. section 1875. She had been granted a jury trial by one district judge; however, a different district judge subsequently ruled to the contrary. The Court of Appeals held there is a Constitutional right to a jury trial both for civil penalty and *backpay.*

The Eleventh Circuit held in *Hill* that a mandatory award of back wages is a legal claim. It stated in *obiter*

dictum that, "Courts have characterized a discretionary award of back wages as equitable" (934 F.2d at 1525); however, whatever the significance of the mandatory/discretionary dichotomy,[3] it was not set forth in support of an assertion that backpay can ever be restitution. As recognized by the Eleventh Circuit in *Hill*, after the trio of Supreme Court decisions upholding the right to jury trials — *Curtis v. Loether*, 415 U.S. 189 (1974); *Tull v. United States*, 481 U.S. 412 (1987); and *Local No. 391 v. Terry*, 494 U.S. 5589 (1990) — it is no longer tenable to argue that backpay is restitution. Indeed, opinion in *Terry*, discussing backpay under the Labor Management Relations Act, contains the sentence, "Such relief is not restitutionary." 494 U.S. ___, 110 S.Ct. at 1348.

Burke v. United States, 929 F.2d 1119 (6th Cir., April 5, 1991) surveyed a wide range of decisions and held Title VII backpay to be "damages received on account of personal injuries or sickness" for purposes of the Internal Revenue Code. One member of the panel dissented. The government argued, unsuccessfully, that backpay awards are 'economic' rather than akin to 'tort type' damages. *Neither the government nor the dissenting judge even put forth the contention that Title VII backpay is restitution or "equitable."* Personal injury damages never have been characterized as equitable relief in our jurisprudence.

Respondent nonetheless argues (at p.16 of its brief) " . . . that backpay under Title VII is restitutionary is not

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[3]The distinction drawn by the Eleventh Circuit in *Hill* between mandatory and discretionary backpay thus seems to be the only thread available to those who would stitch together the blanket statement that jury trials are not available to Title VII litigants. Sections I and III, *infra*, discuss two aspects of this issue.

open to rational debate," citing *Curtis v. Loether* and *Local No. 391 v. Terry*. The quoted statement from Respondent's brief is (at best) a manifestation of misunderstanding. Whatever argument may be available to distinguish a Title VII case from the three Supreme Court cases *Curtis, Tull,* and *Terry,* or from the Eleventh Circuit case *Hill,* restitution appears to be a closed door. (For a more detailed historical analysis of restitution, *see* the Petition herein, pages 11-21).

III. Respondent's argument that backpay is not appropriate in some unusual Title VII actions has no bearing upon the question presented for review.

Petitioner does *not* argue that all Title VII actions are triable by jury. The question presented is limited to those "involving back-pay as a remedy." Respondent seeks to characterize *all* Title VII actions as automatically equitable. The argument is based on the proposition that "back pay is not an automatic or mandatory remedy."[4] Respondent's theory that all Title VII actions are equitable is untenable. Even if in isolated special situations retroactive damages may be denied at the court's discretion, nonetheless, monetary relief to restore lost income cannot be legitimately classified as "equitable."

Respondent relies upon the unique example *City of Los Angeles, Department of Water and Power v. Manhart, supra. Manhart* is unique in that it was the first challenge to a practice in place which affected fifty million Americans who participated in retirement plans other than Social Security. The Court held in *Manhart* that sex-differentiated employee contributions were prohibited by Title VII

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[4] *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 415 (1975).

despite their apparent actuararial justification. In so holding, the Court agreed with the analysis of the statute by the United States Court of Appeals for the Ninth Circuit. Still, the Court vacated the award of retroactive relief, based upon the following exceptional circumstances:

> . . . The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect. Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result. [Footnote omitted.] . . .
>
> There can be no doubt that the prohibition against sex-differentiated employee contributions represents a marked departure from past practice. Although Title VII was enacted in 1964, this is apparently the first litigation challenging contribution differences based on valid actuarial tables. Retroactive liability could be devastating for a pension fund. [Footnote omitted.] The harm would fall in large part on innocent third parties.

Id., 435 U.S. at 721-23; 98 S.Ct. at 1382-83.

Faced with the highly unusual case in which backpay is not appropriate (or is not claimed), a district court may determine that it sits to try the case in equity. The information to make such a determination can be provided by the parties before the court's final ruling on the jury demand. The theoretical possibility that some small number of Title VII actions are equitable does not support Respondent's contention that all are consequently exempt from the requirement of the Seventh Amendment.

IV. Respondent's novel argument that this Court should await pending Congressional legislation ignores the primacy of the Seventh Amendment as a check on the power of the judiciary.

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 109 S.Ct. 2782 (1989), held a bankruptcy estate had a right to a jury trial when sued by a trustee to recover an allegedly fraudulent monetary transfer. It was a 6-3 decision; however, no Justice disagreed with a premise raised by Justice White in dissent (492 U.S. at ___, 109 S.Ct. at 2811, 2812): that a popular check on life-tenured judges is one of two[5] "principal rationales for the existence of the Seventh Amendment guarantee." Justice White quoted with approval the following statement of one scholar, Paul Carrington: "The function of the civil jury is to diffuse the otherwise autocratic power and authority of the judge." *Id. See also* Wolfram, "The Constitutional History of the Seventh Amendment," 57 Minn.L.Rev. 639 (1973).

Nevertheless, Respondent argues (Brief in Opposition, p.19), "Plainly, this Court need not grant the Petition when there remains a possibility that the underlying statute eventually may be amended." Respondent apparently views the federal system of checks and balances as deserving of little respect, a view not shared by the Petitioner or by this Court. This Court could as easily be asked to await a possible repeal of the Seventh Amendment itself.

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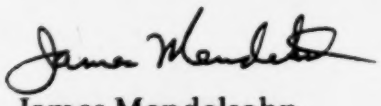
[5]The other is "jury equity." *Id.*

CONCLUSION

The petition should be granted.

Respectfully submitted,



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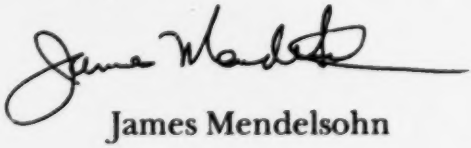
CERTIFICATE OF SERVICE

This is to certify that three copies of the above and foregoing have been served by United States mail, postage prepaid and properly addressed on Mr. James P. Alexander and Mr. John Hargrove, Attorneys at Law, Bradley, Arant, Rose and White, 1400 Park Place Tower, Birmingham, Alabama 35203.

This the 18th day of September, 1991.



James Mendelsohn

APPENDIX

Florenico LINARES, Plaintiff,

v.

CITY OF WHITE PLAINS, et al., Defendants.

89 CIV 7315.

United States District Court,

S.D. New York.

Aug. 12, 1991.

1991 WL 155521

BRIEANT, Chief Judge

By motion filed April 23, 1991, the two remaining defendants in this Title VII employment discrimination suit seek an order striking plaintiff's jury demand. A hearing was held on June 10, 1991 and the case was marked fully submitted on that date. This constitutes the Decision and order of the Court.

This Court previously issued a memorandum decision dated January 7, 1991 granting summary judgment on defendants' motion in favor of all defendants on five of plaintiff's seven claims and dismissing the plaintiff's Complaint in its entirety as against defendants Gordon, Silverbush and Stern. Subsequently, defendants made a motion to reargue and a hearing was held on February 20, 1991. On April 5, 1991, the Court issued a decision which granted defendants' motion for reargument. Upon reargument, the Court adhered to its original decision. *See* Memorandum & Order, April 5, 1991. Familiarity of the reader with these two prior Orders of the Court is assumed.

Now, defendants move to strike the jury demand.

The Court has recently come to believe that Title VII cases properly are triable with a jury. We begin our discussion of the issue by pointing out that the Seventh Amendment provides "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved." The phrase "Suits at common law" refers to "suits at which legal rights [are] to be ascertained and determined,

in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered." *Chauffeurs Teamsters and Helpers, Local No. 391 v. Terry, et al.*, 494 U.S. 558, 110 S.Ct. 1339, 1344 (1990), citing *Parsons v. Bedford*, 3 Pet. 433, 447 (1830). "The right extends to causes of action created by Congress." *Tull v. U.S.*, 481 U.S. 412, 417 (1987). "As the Court noted in *Beacon Theatres v. Westover*, [359 U.S. 500, 501 (1959)], 'maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right should be scrutinized with the utmost care.' " *Terry*, 494 at __, 110 S.Ct. at 1344 (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

Defendants cite a wealth of authority from various Courts of Appeal, all of which were decided before *Terry, supra*, and *Lytle, infra*, that stand for the proposition that a plaintiff is not entitled to a jury trial in a case involving solely Title VII issues. *Olin v. Prudential Ins. Co. of America*, 798 F.2d 1, 7 (1st Cir. 1986); *Wade v. Orange County Sheriff's Office*, 844 F.2d 951, 953 (2d Cir. 1988); *Keller v. Prince Georges County*, 827 F.2d 952, 955 (4th Cir. 1987); *Ward v. Texas Employment Commission*, 823 F.2d 907, 908 (5th Cir. 1987); *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975); *Grayson v. Wickes Corp.*, 607 F.2d 1194, 1196 (7th Cir. 1979); *Bibbs v. Jim Lynch*, 635 F.2d 316, 318 (8th Cir. 1981); *Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975); *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1443 (10th Cir. 1988); and *Lincoln v. Board of Regents*, 697 F.2d 928, 934 (11th Cir. 1983).

In *Terry*, in which the Supreme Court considered the issue of whether a litigant is entitled to a jury trial in an action for breach of the duty of fair representation provided for by Section 301 of the Labor Management Relations Act of 1947, the Court affirmed the denial of a motion to strike the jury demand. The Supreme Court discussed and considered analogous claims in an attempt to determine whether a jury trial was available in an action based on the duty of fair representation.

In its analysis, the Supreme Court discussed *in dicta* whether backpay claimed under Title VII compared with the backpay relief sought by respondents was legal or equitable relief and stated that "[t]he Court has never held that a plaintiff seeking backpay under Title VII has a right to a jury trial. . . . " *Terry*, 494 U.S. at ___, 110 S.Ct. at 1349. Without deciding whether a Title VII plaintiff has a right to a jury trial, the Court stated that it was not persuaded that the type of relief sought in the duty of fair representation suit is analogous to backpay sought in a Title VII suit. *Id.* (citation omitted). The Court concluded that the motion was properly denied by the District Court, holding that the Seventh Amendment entitled the respondents to a jury trial on their claim for monetary damages for breach of the statutory duty imposed by Congress in Section 301.

In *Lytle v. Household Manufacturing, Inc. dba Schwitzer Turbochargers*, 494 U.S. 545, 110 S.Ct. 1331 (1990), decided on the same day as *Terry, supra*, the Supreme Court considered a similar issue. In *Lytle*, a case which involved allegations of retaliation, in violation of 42 U.S.C. § 2000e, *et seq.*, and termination on the basis of race in violation of 42 U.S.C. § 1981, the Supreme Court stated in a footnote that it "has not ruled on the question whether a person seeking relief under Title VII has a right to a jury trial[.]" In *Lytle*, the District Court dismissed the legal claims and held a bench trial on the Title VII claims. This decision was affirmed by the Fourth Circuit Court of Appeals without opinion. *See Lytle v. Household Manufacturing, Inc.*, 831 F.2d 1057 (1987).

On appeal, the decision of the District Court was vacated and remanded. The Supreme Court concluded that the District Court erroneously dismissed the legal claims and stated that "[b]ut for the dismissal of Lytle's § 1981 legal claims, he would have been entitled to a jury trial on all issues common to them and his Title VII equitable claims, *Curtis v. Loether*, 415 U.S. 189, 196, n.11, and the jury would have been required to resolve the legal claims before the court considered the equitable claims." 494 U.S. 545, 110 S.Ct. at 1332.

In *Terry*, and again in *Lytle*, the Supreme Court has hinted, but failed to provide more than a cryptic indication that a Title VII litigant has a right to a jury trial. The tone of this discussion seems totally inconsistent with the popularly held assumption that there is no jury in a Title VII case as a matter of black letter law.

In *Vicinanzo v. Brunschwig & Fils, Inc.*, 739 F.Supp. 882 (S.D. N.Y. 1990), an action under ERISA wherein a disabled beneficiary filed suit challenging cancellation of coverage under a group medical, dental, and life policy and group long-term disability policy, defendant filed a motion to strike plaintiff's jury demand. This Court held that the plaintiff was entitled to a trial before a jury on all contractual issues as well as all mixed questions of law and fact. The Court stated that Congress had reserved an implied statutory right to a jury trial in ERISA cases. As with cases under ERISA, Title VII cases are based on rights and remedies which are created by statute and unknown to the common law. "Even where there is no constitutional right to a jury trial, a court must examine the statute which created the new right of action, . . . to ascertain whether Congress impliedly provided a right to a jury trial. The Seventh Amendment does not prevent Congress from providing a right to a jury trial where a newly contrived statutory remedy is made available to litigants." *Vicinanzo*, 739 F.Supp. at 885, citing *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 12 (How.) 443 (1851).

This Court believes that Congress did impliedly create such a right under Title VII. The statute contains no language expressly foreclosing a litigant's right to a trial by jury. This is strong evidence that Congress did not intend to divest Title VII litigants of the right. *Vicinanzo*, 739 F.Supp. at 885. The Supreme Court has twice suggested this to bench and bar by mentioning the issue in a fashion which would be totally unnecessary were this not so. All but two claims alleged in this action have been dismissed. The two remaining claims (the first and fourth) seek injunctive relief, as well as front-pay, backpay and lost benefits; or in the alternative, reinstatement

to plaintiff's job as Executive Director for the City (*See*, Complaint, p. 19).

As this Court stated in *Vicinanzo*, "[t]he Court [in *Terry*] . . . held that the respondents' claim for backpay was not one for restitution or disgorgement but rather for 'wages and benefits [respondents] would have received from [the employer] had the Union processed the employees' grievance properly.' " 739 F.Supp. at 888 (citing *Terry*, 494 U.S. at ___, 110 S.Ct. at 1348). In addition, the Court noted "that actions for breach of the duty of fair representation target the wrong done the individual employee[,]' (citations omitted) and, as such, give rise to claims for compensatory backpay." *Vicinanzo*, 739 F.Supp. at 888.

The case at bar is similar to *Terry* in that the plaintiff here allegedly was wronged as a result of the improper consideration the employer gave to the fact that plaintiff had filed charges against the employer with the State Division of Human Rights. The improper acts of the plaintiff's employer were allegedly the direct result of employment practices violative of 42 U.S.C. § 2000 e, *et seq.* The plaintiff is seeking legal relief in the form of front pay and lost benefits as an alternative to the equitable remedy of reinstatement. The Supreme Court, however, has stated that the right to a jury trial is not determined exclusively by the nature of the remedy sought. Consideration must also be given to the nature of the issues involved. *Terry, supra.*

In *Tull, supra*, the Supreme Court considered whether the right to a jury trial extends to 33 U.S.C. § 1319(d). The Court reasoned that the text and legislative history of the statute indicates that the statute authorizes a civil penalty to punish culpable individuals, as opposed to statutes designed merely to maintain the status quo or to extract compensation, the latter remedies traditionally issued by courts of equity. Similarly, 42 U.S.C. § 2000e is a statute which exacts civil penalties to punish culpable individuals.

Accordingly, this Court would deny the motion, based on the foregoing reasoning and what we consider to be unmistak-

able signals dropped by the Supreme Court in *Terry* and *Lytle*. However, in the Second Circuit decision on June 27, 1991, in *Frasca v. R.M.G. Investigations and Ronald Goldstein*, Docket No. 917232, an unreported summary Order was handed down by a prestigious panel wherein the Court held that "... appellant had no right to a jury trial on her Title VII claim," *see Wade v. Orange County Sheriff's Office*, 844 F.2d 951, 953 (2d Cir. 1988), ..." We are instructed in the summary order that "[t]his summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other Court." Thus, this rather clear and recent pronouncement of the Second Circuit has no precedential value for the purposes of the pending case, and cannot be relied on as controlling here. It is nevertheless a public record, created by judges assumed to be fully familiar with the problem presented by the gratuitous statements in *Terry* and *Lytle*.

The motion to strike the jury demand is granted.

This Court recognizes that plaintiff and his counsel share the strong view that a jury should be used. Since this issue involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from this order may materially advance the ultimate termination of this litigation, this Court certifies this issue pursuant to Section 1292(b) of Title 28 of the United States Code in the event plaintiff desires to apply for such relief and does so within ten (10) days after entry of this Order. The Court reminds plaintiff, however, that he is under no compulsion to proceed under Section 1292(b) and may appeal from the final judgment following a bench trial, if so advised, pursuant to 28 U.S.C. § 1291.

Following the expiration of ten (10) days and in the absence of an application, this case will be listed as ready when reached for trial to the Court without a jury.

So Ordered.